IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.69 OF 1998

Arpan Leasing Company Limited ...Petitioner

Versus

NTM Steel & Alloys Limited ...Respondent

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Mr.Cyrus Ardeshir with Ms.Indu Prashant i/b M/s.S.Ashwinkumar & Co. for Petitioner.

Mr.Ahmed Sayed i/b Pardiwala & Co. for Respondent.

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CORAM: A.M.KHANWILKAR, J.

AUGUST 9, 2005.

P.C.

1. Heard Counsel for the parties. Perused the proceedings.

2. This Petition is under Sections 433 and 434 of the Companies Act, directing winding up of M/s.NTM Steel and Alloys Ltd. The case of the Petitioner is that the Petitioner and Respondent Company entered into Lease Agreement dated 25th

September 1995 whereunder equipments were provided to the Respondent Company on terms and conditions stated in the Agreement. Under the said Agreement, the Respondent Company was liable to pay lease rent in 36 monthly instalments with the aggregate sum of Rs.41,18,004/- (Rupees Forty-one Lakhs Eighteen Thousand Four) at the rate of Rs.1,14,389/- (Rupees One Lakh Fourteen Thousand Three Hundred Eighty-nine) per month with all applicable taxes for the relevant period. The Respondent Company issued 36 post dated cheques in favour of the Petitioner. It is seen that only 19 cheques have been encashed and the remaining cheques are not paid inspite of repeated reminders. As the Respondent Company failed to pay the outstanding amount towards lease rent, Petitioner gave statutory notice on 22nd September 1997 calling upon the Respondent Company to pay the outstanding amount of Rs.23,14,663.53 (Rupees Twenty-three Lakhs Fourteen Thousand Six Hundred Sixty-three & Paise Fifty-three).

3. In reply to the statutory notice, the Respondent Company sent communication on 6th

October 1997. In Para 8 thereof, it is fairly conceded that the Company was facing severe labour problem and as a consequence of which, on account of financial difficulties, the amount has remained unpaid. In para (f) of the same reply, the Company has admitted that after adjustment of advance, the Company will be liable to pay sum between Rs.10 and 11 lakhs and requested the Petitioner to accommodate the Respondent Company. As no payment was received by the Petitioner inspite of the statutory notice and the above said reply of the Company, present Petition came to be filed under Section 433 and 434 on 20th January 1998.

4. Inspite of notice before admission of this Petition, none appeared for the Respondent Company nor any reply was filed. This Court accordingly passed conditional order on 14th July 1993 requiring the Respondent to deposit sum of Rs.25 lakhs in the specified time. The conditional order was duly communicated to the Respondent Company. Instead of complying with the conditional order, the Respondent Company filed application before this Court for recalling the order of admission

dated 14th July 1998. Even that application came to be dismissed by order dated 20th January 1998. During the course of hearing of the said application, opportunity was offered to the Respondent Company to pay at least portion of the outstanding amount, being Rs.6,00,000/- (Rupees Six Lakhs). However, even that offer was not availed by the Respondent.

5. As mentioned earlier, the Application preferred by the Respondent for recall of order of admission of the Petition came to be rejected. Against the said decision, Respondent took the matter in appeal, which, however was dismissed on 10th July 1999.

6. Later on, when the application for appointment of provisional Liquidator came up for consideration on 22nd January 1999, the Respondent Company while contesting the same, fairly accepted that the outstanding amount payable to the Petitioner was around Rs.6,42,187/- (Rupees Six Lakhs Forty-two Thousand One Hundred Eighty-seven). This position is recorded in the order dated 22nd

January 1999. In other words, the Respondent Company is admittedly liable to pay amount far in excess of Rs.500/- (Rupees Five Hundred).

7. To get over this position, now during the course of argument, it is contended that the Company Petition as filed, itself is not maintainable. This argument is canvassed relying on certain clauses of the Agreement of Lease appended to the Petition as Exhibit ‘A’ to the Petition and Power of Attorney, which is appended to the reply affidavit of the Respondent as Exhibit ‘B’.

8. According to the Respondent, if the Lease Deed and the said Power of Attorney is read as a whole, it is amply clear that the amount which is recoverable by the Petitioner under the Lease Deed from the Respondent Company, has been assigned in favour of Bank of Baroda by the Petitioner. If it is so, it is not open to the Petitioner to institute present Petition in respect of the same claim which is payable to Bank of Baroda. To buttress this submission, reliance is placed on the

decision of the Apex Court in the case of **Bharat Nidhi Ltd. vs. Takhatmal (dead) by his L.Rs. & Anr. reported in A.I.R. 1969 SC 313.**

9. Having considered the rival submissions, I have no hesitation in taking the view that the objection taken on behalf of the Respondent Company is nothing but an argument of desperation. The Lease Deed even if read as a whole or as is suggested by the Respondent, in my opinion, does not even remotely suggest that the claim recoverable by the Petitioner under the Lease Deed has been assigned to Bank of Baroda as such. It is rightly submitted on behalf of the Petitioner that on fair reading of the Lease Deed as well as Power of Attorney executed in favour of Bank of Baroda, would, at best, indicate that charge has been created in favour of Bank of Baroda in respect of the lease rent payable by the Respondent, which was receivable by the Petitioner under the Lease Agreement. That position can be culled out from the recital in the Lease Agreement under the head ‘period of lease’, ‘rental’ and ‘payment of rent’.

In all these clauses, the Respondent Company/lessee has been made liable to pay to "lessor" the Petitioner, lease rentals at the rate specified in the Lease Summary Schedule. In fact, the Respondent Company issued 36 post dated cheques in favour of the Petitioner. The argument of the Petitioner that at best, the intention of the parties was to create charge in respect of the lease rental respectively by the Petitioner is also substantiated from clause (e) of the Lease Agreement and provision made regarding event of default to be committed by the Respondent Company and the remedies available to the Petitioner in that behalf. However, according to the Respondent, clause (e) of the Agreement, would make it amply clear that the lease rent was required to be paid to the Bank of Baroda, which was the designated financial institution. This argument clearly overlooks the nature of arrangement arrived at under the lease agreement.

10. As mentioned earlier, the Respondent Company was primarily liable to the Petitioner to pay the lease rent. Clause (e) of the Agreement

will be of no avail to the Respondent Company to contend that the same tantamount to creating assignment in favour of Bank of Baroda regarding outstanding claim of the Petitioner.

11. Insofar as the Power of Attorney relied upon by the Respondent Company at Exhibit B to the reply affidavit is concerned, it makes it more than clear that Bank of Baroda was only authorised to realise the book debts charged and/or mortgaged and/or hypothecated with the Bank. Besides, the Bank of Baroda was appointed as true and lawful Attorney for and in the name of the Petitioner herein and not to pursue the claim directly against the Respondent Company in its own rights.

12. The fact that Bank of Baroda has not persued the claim directly against the Respondent Company, can be discerned from the Suit, which was filed by the Bank of Baroda against the Petitioner, wherein, the Respondent Company has been named as Defendant No.8. In Paragraph 2 of that Plaint, it is clearly averred that Defendants 4 to 8 were sued as necessary parties, as they have under documents

executed by them, to pay the lease rentals payable to Defendant No.2 (Petitioner herein) to the Plaintiffs (Bank of Baroda) and/or other machinery/vehicle leased to them and hypothecated to the Plaintiffs (Bank of Baroda) as security to the cash credit to the Defendant No.2 (Petitioner herein) by the Plaintiffs (Bank of Baroda). The fact that no substantive relief is claimed by them against the Respondent Company can be culled out from the prayer clause, which is confined only against Defendant Nos.1 to 3 jointly and severally to pay to the Plaintiffs amount specified in prayer clause (a).

13. Counsel for the Respondent Company, however, relying on averments in Paragraphs 15, 16, 22, 29 of the said Plaint and prayer clause (f) would contend that the said suit has been instituted against the Petitioner as also relief is claimed against he Respondent Company. If it is so, as the amount payable to the Petitioner under the Lease Agreement having become payable to Bank of Baroda on account of assignment of actionable claim as is contended, the Company Petition as

filed for the same claim, is not maintainable.

14. In my opinion, none of the Paragraphs of the said Plaint to which reference is made by the Counsel for the Respondent would even remotely suggest that the Bank of Baroda has asked for any substantive relief against the Respondent Company as such. The relief that is claimed against the Respondent, at best, is prayer clause (f), which is only interim order against he Respondent Company to pay to the Plaintiffs, the amount of arrears and future lease rentals towards the Plaintiffs (Bank of Baroda's) claim in the suit.

15. Counsel for the Respondent would then rely on the order passed by Justice Y.S.Jahagirdar dated 10th February 1998 to support the argument that adverse order was passed against the Respondent Company. The fact remains that there is no substantive relief against the Respondent Company prayed by Bank of Baroda. In any case, the said suit later on stood transferred to Debts Recovery Tribunal and I am informed that the entire claim of the Bank of Baroda has been satisfied by

M/s.Troobloo Ltd. which is the sister concern of the Petitioner Company. In fact, a formal application has also been filed before the Debts Recovery Tribunal for permission to implead the said Company as the Plaintiff and to transfer the said proceedings back to the High Court.

16. Be that as it may, in my opinion, neither the Lease Agreement nor the Power of Attorney to which reference is made by the Counsel for the Respondent, would suggest that the Petitioner has assigned the claim under the Lease Agreement. As mentioned earlier, at best, charge has been created in relation to the claim of the Petitioner in favour of Bank of Baroda. Besides, Bank of Baroda has not chosen to proceed against the Respondent Company in that no substantive relief has been claimed in the Suit as filed. Assuming that the document namely Lease Deed and Power of Attorney will have to be construed as assignment of actionable claim, the fact remains that Bank of Baroda has not chosen to proceed against the Respondent company for recovery of the amount by way of substantive relief in the Suit. In such a

situation, the reliance placed on the decision of the Apex Court in **Bharat Nidhi Ltd. (supra)** is inapposite. In that case, the Apex Court was called upon to construe whether the Power of Attorney read in the light of endorsement on the bill, created interest in the specific fund and was irrevocable. In the present case, however, that situation does not arise and as it is not an assignment of actionable claim, the objection taken on behalf of the Respondent is wholly untenable.

17. Insofar as merits are concerned, as mentioned earlier, the Respondent Company has admitted liability to pay the amount which is just claim of the Petitioner. At least to the extent of Rs.10 and 11 lakhs in the reply to the statutory notice and later on Rs.6,42,187/- (Rupees Six Lakhs Forty-two Thousand One Hundred Eighty-seven) before this Court as mentioned in order dated 22nd January 1999. The Respondent Company has not offered any amount to the Petitioner at all, nor to the Bank of Baroda.

18. In this view of the matter, it necessarily

follows that the Respondent Company has failed to rebut the legal presumption arising against it that it is unable to pay its debt. The defence taken on behalf of the Respondent as mentioned earlier, is not bonafide or honest and for which reason, this Petition deserves to succeed in terms of prayer clause (a). Ordered accordingly.

A.M.KHANWILKAR, J.